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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. AARON GLENN SPONSELLER, Defendant and Appellant.	G038737 (Super. Ct. No. 06CF2413) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William Lee Evans, Judge. Affirmed.

Erin Booth, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Randall Einhorn and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Aaron Glenn Sponseller appeals from a petty theft conviction that resulted in a sentence of three years in state prison.[1] The appeal presents two challenges to the conduct of his trial: First, he asserts that the trial judge misinstructed the jury on the burden of proof. The issue arose in the context of a note from the juror asking for help when they seemed deadlocked. Second, he says that the prosecutor was guilty of misconduct in alluding to a comment made by a prospective juror, a former teacher, on voir dire, to the effect that it was her experience that when a person denies a theft allegation, the person ultimately turns out to have been the culprit.

The first argument appears close when you take a single sentence uttered by the trial judge out of context. The argument ultimately fails, however, when we examine the *entirety* of the trial judge's remarks to the jury in response to the note, which emphasized and re-emphasized that reasonable doubt should lead to acquittal. Indeed, no less than four times, the judge reiterated that absent an abiding conviction of guilt, the jury must acquit. To prove the point, we are attaching, as an appendix to this opinion, the entirety of the trial judge's comments, highlighting in italics and bold font those portions.

The second argument has some merit. The prosecutor's comment tended to undermine the presumption of innocence based on an out-of-court opinion used to undermine the defendant's testimony.

However, even under the federal beyond-a-reasonable-doubt test articulated in *Chapman v. California* (1967) 386 U.S. 18, 24, the error was harmless. There was a testifying eyewitness. The trial judge de facto corrected the misconduct when he subsequently instructed the jury to decide the case only on the evidence presented and that closing remarks were not evidence. Sponseller acted like a man who was guilty when he was first arrested, asserting essentially that because he was not found with the

[1] Specifically, Aaron Sponseller was charged with one count of petty theft with a prior theft conviction (Pen. Code, §§ 484, subd. (a); 488; 666) and a prison prior (Pen. Code, § 667.5, subd. (b).). Sponseller was sentenced to three years in state prison: the middle term of two years for the underlying crime, plus another year, to run consecutively, for a prior term in prison. The court struck punishment for three other prior prison terms.

loot *on him* that he could not be lawfully arrested for taking it, which was tantamount to an admission.

II. FACTS

A. *The Underlying Narrative*

While the appeal presents no issue of substantial evidence, a brief review of the underlying facts found by the jury sheds some light on why, at a certain point in the deliberations, two of the jurors were hesitant to convict.

Sponseller was hired out by a labor exchange, Labor Ready, to do some temporary construction work at a Lane Bryant store in the Tustin Marketplace. By about 11:45 a.m. the Lane Bryant construction manager determined that he was no longer needed, and signed his time card for four hours of work, so as to send him back to Labor Ready.

As he was leaving, a worker assigned to another store who was at that point taking out some trash spotted Sponseller "dump[] something behind the trash can."[2] Sponseller was "coming quickly as if he was trying to hide himself from the person who he had been working with . . . ." The worker told the construction manager that he saw Sponseller take something from the manager's tool container and throw it in the bushes, and when the manager checked it, he found his new skill saw missing.

The manager soon noticed Sponseller on his bike riding on the outside of the parking area and called to him, "Hey, come here."

Sponseller stopped, and rode back.

The manager told him, "I was told that you had taken something out of my container and thrown it up in the bushes." The manager grabbed the front tire of Sponseller's bicycle, and told him to "go find that saw."

Sponseller said, "I didn't take anything."

[2] The testimony is not exactly clear as to whether Sponseller had "run rapidly" to the area where he threw in the bag or Sponseller was on his bicycle "going by quickly."

The manager replied, "Well, hey, I got people that said that you have taken something and it's obviously something missing. Just do me a favor, go find it, put it back there, you can have your bike and get out of here."

Sponseller protested, "I didn't do anything. I didn't touch anything. Well, who are they?"

The manager replied, "People that I have worked with for quite a while here. They say you took something . . . ."

And with that a tug-of-war ensued over the bike.

Soon shopping center security and the police showed up. Sponseller was angry, belligerent, irrational. How could he be arrested, he asked, when the officer hadn't heard his side of the story.

The officer said he'd love to hear Sponseller's side of the story. The officer then cautioned Sponseller about his *Miranda* rights.

Sponseller spoke. He said he did not steal the skill saw, he was being wrongly accused by the manager. Then he told the officer that he could not be arrested if he "didn't have the saw on his person" -- a point he repeated "five times at least."

Sponseller soon found himself "in bracelets."

Another police officer and a couple of other security officers arrived. They soon found a black bag with a skill saw. Sponseller was hustled away into a police car.

B. *Conduct of the Trial*

1. The Basis for the

Prosecutorial Misconduct Argument

Sponseller's case was tried to a jury. He took the stand in his own defense. He said he and the manager "kind of got into a misunderstanding" that led to the confrontation about the skill saw and agreed that the manager had grabbed hold of his bike. Sponseller told the manager, "I don't know where your saw is," and the next thing he knew police showed up and he was under arrest. His testimony culminated with a straightforward "no" to the straightforward question, "Did you steal the saw on July 31, 2006?"

During closing argument, the prosecution asked the jury to "Remember the teacher sitting up in the top row during voir dire? She said, I am a teacher, been seeing this for 35 years, somebody said this person stole something, we talk to him where they always say no what always happens? They end up doing it." Defense counsel did not object.

2. The Basis for the

Misinstruction Arguments

After both sides rested, the court instructed the jury. The instructions included some very standard admonitions, including:

-- the fact that a criminal charge has been filed against someone "is not evidence the charge is true,"

-- that "A defendant in a criminal action is presumed to be innocent" and, perhaps most significant for our purposes in this case, the instruction

-- that "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true."

We should note at this point that, on appeal, Sponseller presents no challenge to the latter instruction.

After the jury began its deliberations, the jury sent a note back to the judge. His response forms the basis for Sponseller's misinstruction argument on appeal. In the appendix, we re-produce the complete record of the note and the judge's remarks in response to it. The misinstruction argument comes from this exchange which was part of the colloquy:

"Juror #11:

". . . .

". . . . Two jurors have remained focused on the fact that the evidence provided is swaying them a percentage weight value, but not into total abiding conviction."

"The Court: That is sufficient because the law does require that each and every one of you have an abiding conviction in terms of the -- in order to convict an

abiding conviction and feel that the evidence is proven beyond a reasonable doubt and that you remain with that abiding conviction that the charges are true from the evidence that's been presented."

During the exchange, the trial court also had occasion to make two remarks that have also featured in this appeal. One was simply to note that the case involved a "credibility call." (That was obvious, given Sponseller's taking the stand and straight out denying that he stole the saw.)

The other was to recognize that not every question in a case can be answered. (But, as we show, the judge quickly pointed out that it was *material questions* that had to be answered. You might not know what color socks a defendant was wearing at a certain time, but you don't have to know the answer to that question.)

On appeal, Sponseller now argues that this exchange effectively misinstructed the jury to use a lower standard of proof than reasonable doubt. Because it is the more formidable of Sponseller's arguments on appeal, we will address it first.

III. DISCUSSION

A. The Jury Misinstruction Issues

1. The "Sufficient" Comment

Putting aside the contention that Sponseller waived any challenge to the trial court's comments to the jury by not objecting at the time, we must reject his misinstruction argument on the merits.

As the court said in *People v. Stone* (2008) 160 Cal.App.4th 323, 331, "a jury instruction cannot be judged on the basis of one or two phrases plucked out of context." Or, to put it another way, in the context of jury instructions, context is everything. (See *Novak v. Low, Ball & Lynch* (1999) 77 Cal.App.4th 278, 283 ["Context is everything."].)

In context, the judge did not say, 55 percent is enough to convict. Actually, quite the contrary. He was saying that the two jurors who were the subject of the note were properly interpreting the law. They were not voting for conviction because they found the evidence inadequate to create an "abiding conviction" of defendant's guilt.

At the time of his "sufficient" comment, the judge was not instructing the jury on the burden of proof, but was instead inquiring into the basis of the two jurors' indecision -- was the *basis* for their indecision *sufficient*. That is, the judge was concerned whether the jurors' *indecision* was based on the evidence -- which is a "sufficient" reason for juror indecision -- or whether that indecision was based on such extraneous matter was the way an "attorney dresses" or otherwise "presents evidence" -- which is an insufficient basis for indecision.

We have highlighted the comment from the transcript on the trial court's inquiry as to whether the jurors' "*decision's being made* by the, nonetheless, *on the adequacy of the evidence*." (Italics added.) Thus the whole exchange began with the jury foreperson's comment that some jurors felt that it was their job to evaluate the case on the way the *attorneys* "presented" it: Juror #11: "Ten have decided, two have evaluated decisions about *55 percent* in the other way, but have felt that *the presentation was not done well enough by either side with respect to counsel*." (Italics added.)

Secondly, the trial judge soon focused the jury on the correct burden of proof: "I don't want to force anybody to do something, but obviously this is a case where *the People have the burden of proof* and *the jurors need to be convinced by the evidence* that the evidence is sufficient to convict them, either convict a person, or *insufficient, then it's a not guilty verdict. It isn't a popularity contest about how well the attorneys did. It's what the evidence provides* you in the end." (Italics added.) That point is confirmed in these remarks, reiterating the trial court's concern that the jurors focus on the evidence, not the attorneys: "So I need to make sure that if it's -- it's a situation where the jurors are using *something other than the evidence to come to a conclusion* in this case, then it does concern me some because I don't want a decision that is made based upon you like the *way this attorney dresses or you like the way this attorney presents it . . . .*" (Italics added.)

It was at this point that the jury foreperson responded: The indecisive jurors were worried about the evidence reaching a certain "percentage weight value," when there was not a "total abiding conviction." "I would say that the two jurors in

question would base it on the inadequacy of the evidence provided . . . the two jurors have remained focused on the fact that the evidence provided is swaying them *a percentage weight value, but not into total abiding conviction***.**" (Italics added.)

And, correctly, the trial judge told the jurors that it was "sufficient" to come to a *decision* if they didn't have a total abiding conviction; that decision would have been not guilty. As the judge had just said: "I don't want to force anybody to do something, but obviously this is a case where the People have the burden of proof and the jurors need to be convinced by the evidence that the evidence is sufficient to convict them, either convict a person, or *insufficient, then it's a not guilty verdict*." (Italics added.)

And just a few moments later, the judge reiterated the very same point: "If the jurors feel that the evidence has been insufficient to provide them with an abiding conviction of the truth of the charges, *they should not convict the defendant*."

Consider also, in this regard that, immediately after the "sufficient" comment on which Sponseller focuses, the trial judge yet again returned, virtually in the same breath, to the correct standard -- to the need for *evidence beyond a reasonable doubt* to convict: "The Court: That is sufficient because *the law does require that each and every one of you have an abiding conviction in terms of the -- in order to convict an abiding conviction and feel that the evidence is proven beyond a reasonable doubt* and that you remain with *that abiding conviction that the charges are true* from the evidence that's been presented." (Italics added.)

We decline to parse the record in such a way as to conclude that the trial judge immediately contradicted himself after the "sufficient" comment. The natural, contextual reading is that the trial judge was simply telling the two indecisive jurors that if they did not have an abiding conviction of Sponseller's guilt, that lack of abiding conviction was sufficient for a *not guilty vote*. We note, in this regard, that, just prior to the jurors return to deliberations, the trial judge told them, "If you turn out to be a hung jury, so be it."

And if there is (for sake of argument) any doubt about our reading of the trial judge's comments, it is dispelled by an abundance of instruction afterwards clearly

spelling out the right standard of proof: Significantly, the trial judge went out of his way to correct what might have been a misimpression formed by the jury foreperson that the standard was "preponderance of the evidence." Juror number 11, the foreperson, had asked: "However you want to give it, but instruct the jury one last time on the preponderance of evidence and what they need to think about and whether what they need to guess about facts." The trial judge (to be sure, gently) disabused the foreperson of the misimpression: "And you have that instruction on reasonable doubt, so just keeping in mind, [juror number 11], the preponderance of evidence. I am sure that is because lay people talk that way that *we have to talk in a standard, standard of proof beyond a reasonable doubt*." (Italics added.) The court further told the jury: "Unless this evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal. You must find him to be not guilty."

2. The "Credibility Call" and

"Unanswered Questions" Issues

The trial judge's comments that the case came down to a credibility call, or that not all the jurors' questions might be answered, was wholly innocuous. As to the former, the trial judge was entitled to point out the obvious to the jury. Penal Code section 1093, subdivision (f) provides in pertinent part: "The judge may then charge the jury, and shall do so on any points of law pertinent to the issue, if requested by either party; and *the judge may state the testimony, and he or she may make such comment on the evidence and the testimony and credibility of any witness as in his or her opinion is necessary for the proper determination of the case and he or she may declare the law*." (Italics added.) Here, the court did not go as far as section 1093 allows. As the Appendix shows, the "credibility call" was scrupulously neutral. (See also, *People v. Rodriguez* (1986) 42 Cal.3d 730, 768, 773 [trial court "may focus critically on particular evidence, expressing views about its persuasiveness"].)[3]

[3] The trial judge here came no where close to the mistake made by the trial judge in *People v. Flores* (1971) 17 Cal.App.3d 579, 586, who commented that he "would not have spent two minutes in deciding this case because I would have decided that the defendant was guilty."

As to the latter, context once again trumps proof texting. The comment was made in the context of responding to a juror's request for clarification as to each juror's responsibility.[4] The trial judge informed the jurors that questions going to essential elements of the crime were "important" and must be answered. Otherwise, "the charges haven't been proven." The jurors' responsibility did not extend to resolving all *immaterial* questions, and the judge gave the example of whether the driver in an auto accident case was wearing red socks or white socks. Thus it was only those questions unrelated to the material elements of the charge that he instructed the jury to disregard.[5]

Finally, once again it must be remembered that the record in the entire colloquy between judge and jurors is replete with instances where the court continually kept the jury "on topic" (to use the collegiate phrase) by reminding them that proof beyond a reasonable doubt was the standard.

B. *The Prosecutorial Misconduct Issue*

In rebuttal closing argument, the prosecutor alluded to a prospective juror whose experience as a teacher had made her skeptical of those who deny their guilt of theft allegations.[6] There was no objection to the comment that might have allowed the

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[4] Juror number four had asked: "I hate to interject, but I don't feel satisfied with understanding what I need to do, so I want to ask a question. . . . The question in my mind is the evidence as presented raised a lot of questions in my mind, and I am wondering, *am I supposed to answer those questions on my own* or just dismiss the questions and go with what was told to me in evidence?" (Italics added.)

[5] The trial judge's comments in this context were as follows: "There isn't any trial in which all of the questions might be answered. The key for the jurors is to examine your questions, does it deal with a material element of the charge. In other words, the charges. The crime has elements. If you find the things you have questions about in terms of the level of proof deals specifically with the elements of the crime, then that is important. And I am going to use an example outside of this case. If the question in which you were trying an automobile accident and it was a question of whether one driver had red socks or white socks, it means nothing about the fact that an automobile accident happened. So a person might have questions about whether a detail of red socks or white socks was satisfied, but it's not going to change the fact that an automobile accident happened. [¶] So you have to focus your questions and your determination down to the evidence and the adequacy of the evidence to prove the element of the charges themselves. And in this case I have given you those elements what a theft crime is and really there is -- the other part is whether or not the conviction exists, the prior conviction exists. [¶] But so with regard to the answer I'd have to give you then in the general sense is there isn't any trial that doesn't come with some questions that never get answered, but those trials that come with questions whether or not answered and they deal with the material element of the charges haven't been proven then. But if in fact all the elements of the particular charge have been provided by evidence which you choose to believe, then your questions won't all be answered. As long as those questions get answered for you, that would be. If they're not, then fine, that is just the material elements."

[6] Here is the text from the transcript, the prosecutor has just gotten up to begin the rebuttal after defense counsel concluded her closing argument: "I guess my question is do you buy the defense argument? I mean if you do, walk him. Just, you know, find him not guilty. But there is no evidence -- there is no evidence for not guilty verdict

trial court to cure any arguable misconduct, but in any event we address the merits directly. (But see *People v. Earp* (1999) 20 Cal.4th 826, 858, 862 ["'To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.'"].[7])

The comment *was* indeed prosecutorial error. (See *People v. Hill* (1998) 800, 823 [observing that "misconduct" may not be the right word when the prosecutor does not act with a "culpable state of mind"].) The allusion effectively told the jury to decide against Sponseller *because* he had taken the stand and denied his guilt, based on a comment of an excused juror. That is, it undermined the presumption of innocence. The defense attorney should have objected, and in any event the trial judge should have instructed the jury to disregard the comment. However, under the facts of this case, we must conclude the error was harmless.

Preliminarily, we will assume, for sake of argument, that the stricter federal "reasonable doubt" standard enunciated in *Chapman* applies. (*Chapman v. California*, *supra*, 386 U.S. 18, 24 ["we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"].)

The fact remains that an eyewitness saw Sponseller dump the bag with the saw in it behind a trash can, the manager discovered his saw was missing, and the saw was soon found in that bag. The trial judge introduced closing argument with the admonition that counsel's arguments were not "additional evidence." The prosecutor's comment was an isolated one and on a general topic -- a witness's credibility -- on which

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except the defendant's testimony. That's it. And then you look at what we have on the prosecution's side. Remember the teacher sitting up in the top row during voir dire? She said, I am a teacher, been seeing this for 35 years, somebody said this person stole something, we talk to him where they always say no, what always happens? They end up doing it." The prosecutor then went on with the theme of Sponseller's credibility, noting his "recall issues" and his reasons to "selectively forget."

The prosecutor completed with his rebuttal with a digression on fox hunting and red herrings, the point of which was that hounds always find the fox, even if they are first given "red herrings" to smell before the hunt.

[7] We also decline to decide the matter on the procedural point that *appellate counsel's* failure to include a transcript of the voir dire in which the teacher supposedly made her remark about the tendency of thieves to deny guilt is itself preclusive of proper consideration of the issue. There is no dispute the prosecutor made the remark he did.

he could legitimately comment. Moreover, soon thereafter the trial court instructed the jury to decide the case on the evidence, not counsel's arguments. And the fact the jury requested read-backs of testimony does not suggest a close case swayed by the prosecutor's stray remark. Rather, it suggests that the jury actually was following the trial judge's admonition to decide the case on the evidence.

IV. DISPOSITION

The judgment is affirmed.

SILLS, P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.

Appendix

THE COURT: PEOPLE VERSUS SPONSELLER. RECORD REFLECT MR. SPONSELLER IS PRESENT WITH HIS ATTORNEY, THE DISTRICT ATTORNEY, WE HAVE OUR JURORS THAT ARE DELIBERATING ON THAT AS WELL. THAT IS ALL THE JURORS WE HAVE, ALL 12 OF THEM.

JUROR # ll [NAME REDACTED], I NEED TO ASK YOU SOME QUESTIONS BASED UPON AS THE FOREPERSON.

JUROR #11: SURE.

THE COURT: YOU HAVEN'T BEEN KICKED OUT AS FORE PERSON?

YOU'RE STILL THE FOREPERSON?

JUROR #11: THEY TRIED TO, BUT, YOU KNOW, THERE WAS A VOTE TO KEEP ME.

THE COURT: I GOT TO ASK YOU SOME QUESTIONS. I GOT A NOTE HERE, THE LAST NOTE, AND I KNOW YOU HAD REREADING OF TESTIMONY, PRETTY MUCH THE REREADING OF THE ENTIRE TRIAL. I AM JUST GOING TO READ INTO THE RECORD THIS NOTE THAT I HAVE.

"TWO JURORS HAVE STATED THAT BOTH SIDES HAVE NOT PROVIDED ENOUGH PRESENTATION FOR AN ABIDING DECISION EITHER WAY." SO GUILTY OR NOT GUILTY, THAT PART I DON'T WANT TO KNOW. I AM GETTING FROM THIS A SPLIT, ABOUT 10 TO 2 SPLIT. WHAT I NEED TO ASK YOU, THIS DOESN'T TELL ME WHETHER IT'S TEN WHO HAVE DECIDED AND TWO THAT ARE UNDECIDED OR TEN WHO HAVE DECIDED ONE WAY AND TWO HAVE DECIDED ANOTHER WAY.

IS IT TWO OF THEM UNDECIDED?

JUROR #11: I WILL BE VERY POLITICALLY CORRECT, TEN HAVE DECIDED.

THE COURT: DON'T TELL

JUROR #11: ***TEN HAVE DECIDED. TWO HAVE EVALUATED DECISIONS ABOUT 55 PERCENT IN THE OTHER WAY, BUT HAVE FELT THAT THE PRESENTATION WAS NOT DONE WELL ENOUGH BY EITHER SIDE WITH ALL RESPECT TO COUNSEL***.

THE COURT: -OKAY. WELL, LET'S --

JUROR #11: SO THAT WAS THE COMMENT. I KNOW THE COMMENT'S VERY VAGUE, BUT SO WAS THE TRIAL THOSE TWO JURORS HAD INDICATED.

THE COURT: I WANT TO MAKE SURE THAT I DON'T --

JUROR #11: NO PROBLEM.

THE COURT: I DON'T WANT TO FORCE ANYBODY TO DO ANYTHING. THIS WOULD BE A GENERAL STATEMENT TO YOU.

JUROR #11: RIGHT.

THE COURT: I DON'T WANT TO FORCE ANYBODY TO DO SOMETHING, BUT OBVIOUSLY ***THIS IS A CASE WHERE THE PEOPLE HAVE THE BURDEN OF PROOF AND THE JURORS NEED TO BE CONVINCED BY THE EVIDENCE THAT THE EVIDENCE IS SUFFICIENT TO CONVICT THEM, EITHER CONVICT A PERSON, OR INSUFFICIENT, THEN IT'S A NOT GUILTY VERDICT***. IT ISN'T A POPULARITY CONTEST ABOUT HOW WELL THE ATTORNEYS DID. IT'S WHAT THE EVIDENCE PROVIDES YOU IN THE END.

IF THE JURORS FEEL THAT THE EVIDENCE IS SUFFICIENT TO HAVE AN ABIDING CONVICTION THE DEFENDANT IS GUILTY, THEY SHOULD FOLLOW THAT. ***IF THE JURORS FEEL THAT THE EVIDENCE HAS BEEN INSUFFICIENT TO PROVIDE THEM WITH AN ABIDING CONVICTION OF THE TRUTH OF THE CHARGES, THEY SHOULD NOT CONVICT THE DEFENDANT***.

SO I NEED TO MAKE SURE THAT IF IT'S -- IT'S A SITUATION WHERE THE JURORS ARE USING SOMETHING OTHER THAN THE EVIDENCE TO COME TO A CONCLUSION IN THIS CASE, THEN IT DOES CONCERN ME SOME BECAUSE ***I DON'T WANT A DECISION THAT IS MADE BASED UPON YOU LIKE THE WAY THIS ATTORNEY DRESSES OR YOU LIKE THE WAY THIS ATTORNEY PRESENTS IT*** --

JUROR #11: NO.

THE COURT: -- ***AS OPPOSED TO THE EVIDENCE***. EITHER

CONVINCES ME OR DOESN'T CONVINCE ME. OR WOULD YOUR FEELING BE IT IS -- SEE, I DON'T WANT TO EMBARRASS THE JURORS THAT MIGHT BE

JUROR #11: YOU'RE NOT.

THE COURT: AND--

JUROR #11: I WILL.

THE COURT: WOULD YOUR FEELING BE A ***DECISION'S BEING MADE BY THE, NONETHELESS, ON THE ADEQUACY OF THE EVIDENCE***?

JUROR #11: I WOULD BELIEVE IT TO BE.

THE COURT: OR INADEQUACY?

JUROR #11: I WOULD SAY THAT THE TWO JURORS IN QUESTION WOULD BASE IT ON THE INADEQUACY OF THE EVIDENCE PROVIDED. ALTHOUGH, I DID READ THE RULES OF THE GAME, SO TO SPEAK, AND SO THEY FELT THAT THERE NEEDED TO BE MORE CLARIFICATION. ONE CLARIFICATION SPECIFICALLY FROM YOU REGARDING IF THIS IS WHAT WE GOT, IS THIS WHAT WE GOT TO RULE ON?

I HAVE BEEN PRESSING THE WHOLE TIME IF THIS IS WHAT YOU GOT, THIS IS WHAT YOU GOT TO RULE ON, PERIOD. SO, YOU KNOW, AND THERE IS A LOT AT STAKE IN THIS PARTICULAR CASE AND THERE IS SOME CONVICTIONS ON THE JURY WITH THAT ISSUE.

SO WITH THAT SAID, THE TWO JURORS HAVE REMAINED FOCUSED ON THE FACT THAT ***THE EVIDENCE PROVIDED IS SWAYING THEM A PERCENTAGE WEIGHT VALUE, BUT NOT INTO TOTAL ABIDING CONVICTION.***

THE COURT: THAT IS SUFFICIENT BECAUSE THE LAW DOES REQUIRE THAT EACH AND EVERY ONE OF YOU HAVE AN ABIDING CONVICTION IN TERMS OF THE -- ***IN ORDER TO CONVICT AN ABIDING CONVICTION*** AND FEEL THAT *THE EVIDENCE IS PROVEN BEYOND A REASONABLE DOUBT* AND THAT YOU REMAIN WITH THAT ABIDING CONVICTION THAT THE CHARGES ARE TRUE FROM THE EVIDENCE THAT'S BEEN PRESENTED.

AND SO WHAT I AM HEARING FROM -- YOU SOUND LIKE MAYBE THAT IS THEIR EVALUATION AS WELL.

NOW, I AM GOING TO ASK YOU ONE MORE QUESTION.

JUROR #11: SHOOT.

THE COURT: SINCE YOU REREAD THE TESTIMONY IN THE ENTIRE TRIAL, NOT LIKELY ANY MORE REREADING IS GOING TO REFRESH YOUR MEMORY ABOUT WHAT HAPPENED. DO YOU THINK THERE IS ANYTHING ELSE THAT I COULD DO WITH REGARD TO INSTRUCTIONS ON THE LAW THAT MIGHT BRING ABOUT A DECISION IN THIS MATTER?

JUROR #11: YES. JUST INSTRUCT THE JURY ONE MORE TIME AND GIVE US SEVEN MINUTES IN THE JURY -- OR HOWEVER YOU WANT TO GIVE IT, BUT INSTRUCT THE JURY ONE LAST TIME ON THE PREPONDERANCE OF EVIDENCE AND WHAT THEY NEED TO THINK ABOUT AND WHETHER WHAT THEY NEED TO GUESS ABOUT FACTS.

THE COURT: SO YOUR FEELING IS BY THE COURT REEMPHASIZING GOING BACK OVER CERTAIN JURY INSTRUCTIONS THAT DEAL WITH THE BURDEN OF PROOF

JUROR #11: YEP.

THE COURT: -- THE EVALUATION OF EVIDENCE, THAT MAYBE THAT MIGHT BE OF ASSISTANCE?

JUROR #11: THAT IS RIGHT ON TARGET, YOUR HONOR.

THE COURT: YES, SIR. I HAVE JUROR #4 [NAME REDACTED] RAISING--

JUROR #4: I HATE TO INTERJECT, BUT I DON'T FEEL SATISFIED WITH UNDERSTANDING WHAT I NEED TO DO, SO I WANT TO ASK A QUESTION. IS THAT PERMITTED?

THE COURT: YOU CAN ASK THE QUESTION. I AM NOT SURE I CAN GIVE YOU AN ANSWER. I HAVE TO BE CAUTIOUS HERE.

JUROR #4: THE QUESTION IN MY MIND IS THE EVIDENCE AS PRESENTED RAISED A LOT OF QUESTIONS IN MY MIND, AND I AM I WONDERING, AM I SUPPOSED TO ANSWER THOSE QUESTIONS ON MY OWN OR JUST DISMISS THE QUESTIONS AND GO WITH WHAT WAS TOLD TO ME IN EVIDENCE?

THE COURT: WELL, WITHOUT SPECIFICS I AM GOING TO GIVE YOU A GENERAL ANSWER.

JUROR #4: OKAY.

THE COURT: THERE ISN'T ANY TRIAL IN WHICH ALL OF THE QUESTIONS MIGHT BE ANSWERED. THE KEY FOR THE JURORS IS TO EXAMINE YOUR QUESTIONS, DOES IT DEAL WITH A MATERIAL ELEMENT OF THE CHARGE. IN OTHER WORDS, THE CHARGES. THE CRIME HAS ELEMENTS. IF YOU FIND THE THINGS YOU HAVE QUESTIONS ABOUT IN TERMS OF THE LEVEL OF PROOF DEALS SPECIFICALLY WITH THE ELEMENTS OF THE CRIME, THEN THAT IS IMPORTANT. AND I AM GOING 10 TO USE AN EXAMPLE OUTSIDE OF THIS CASE. IF THE QUESTION IN WHICH YOU WERE TRYING AN AUTOMOBILE ACCIDENT AND IT WAS A QUESTION OF WHETHER ONE DRIVER HAD RED SOCKS OR WHITE SOCKS, IT MEANS NOTHING ABOUT THE FACT THAT AN AUTOMOBILE ACCIDENT HAPPENED. SO A PERSON MIGHT HAVE QUESTIONS ABOUT WHETHER A DETAIL OF RED SOCKS OR WHITE SOCKS WAS SATISFIED, BUT IT'S NOT GOING TO CHANGE THE FACT THAT AN AUTOMOBILE ACCIDENT HAPPENED.

SO YOU HAVE TO FOCUS YOUR QUESTIONS AND YOUR DETERMINATION DOWN TO THE EVIDENCE AND THE ADEQUACY OF THE EVIDENCE TO PROVE THE ELEMENT OF THE CHARGES THEMSELVES. AND IN THIS CASE I HAVE GIVEN YOU THOSE ELEMENTS WHAT A THEFT CRIME IS AND REALLY THERE IS -- THE OTHER PART IS WHETHER OR NOT THE CONVICTION EXISTS, THE PRIOR CONVICTION EXISTS.

BUT SO WITH REGARD TO THE ANSWER I'D HAVE TO GIVE YOU THEN IN THE GENERAL SENSE IS THERE ISN'T ANY TRIAL THAT DOESN'T COME WITH SOME QUESTIONS THAT NEVER GET ANSWERED, BUT THOSE TRIALS THAT COME WITH QUESTIONS WHETHER OR NOT ANSWERED AND THEY DEAL WITH THE MATERIAL ELEMENT OF THE CHARGES HAVEN'T BEEN PROVEN THEN. BUT IF IN FACT ALL THE ELEMENTS OF THE PARTICULAR CHARGE HAVE BEEN PROVIDED BY EVIDENCE WHICH YOU CHOOSE TO BELIEVE, THEN YOUR QUESTIONS WON'T ALL BE ANSWERED. AS LONG AS THOSE QUESTIONS GET ANSWERED FOR YOU, THAT WOULD BE. IF THEY'RE NOT, THEN FINE, THAT IS JUST THE MATERIAL ELEMENTS.

SO I AM GOING TO GET THE INSTRUCTIONS HERE, SEE IF I CAN -- I DON'T KNOW IF I AM GOING TO HIT INSTRUCTIONS THAT ARE GOING TO ANSWER WHAT JUROR #11 HAS TOLD ME. I AM GOING TO PICK OUT SOME OF THESE INSTRUCTIONS TO KIND OF -- I'D LIKE TO PARAPHRASE THEM. I AM NOT GOING TO TAKE THAT CHANCE. ***AND YOU HAVE THAT INSTRUCTION ON REASONABLE DOUBT, SO JUST KEEPING IN MIND, JUROR #11, THE PREPONDERANCE OF EVIDENCE. I AM SURE THAT IS BECAUSE LAY PEOPLE TALK THAT WAY WE HAVE TO TALK IN A STANDARD, STANDARD OF PROOF BEYOND A REASONABLE DOUBT***.

YOU START OFF WITH PRESUMPTION OF INNOCENCE AND THE DEFENDANT HAS TO BE PROVEN GUILTY BEYOND A REASONABLE DOUBT. AND ***PROOF BEYOND A REASONABLE DOUBT IS THAT WHICH LEAVES YOU WITH AN ABIDING CONVICTION THE CHARGE IS TRUE***. THE EVIDENCE NEED NOT ELIMINATE ALL POSSIBLE DOUBT BECAUSE EVERYTHING IN LIFE IS OPEN TO SOME POSSIBLE OR IMAGINARY DOUBT. AND WHEN DECIDING WHETHER THE PEOPLE HAVE PROVEN THEIR CASE BEYOND A REASONABLE DOUBT, YOU MUST COMPARE AND CONSIDER ALL THE EVIDENCE RECEIVED THROUGHOUT THE TRIAL. AND ***UNLESS THIS EVIDENCE PROVES THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT, HE IS ENTITLED TO AN ACQUITTAL. YOU MUST FIND HIM TO BE NOT GUILTY.***

OBVIOUSLY I AM GOING TO MAKE A COMMENT ON THE EVIDENCE, THEN I AM GOING TO READ AN INSTRUCTION TOO THAT ***THIS CASE DOES COME DOWN TO WHAT I WOULD CALL A CREDIBILITY CALL***. AND IF YOU CHOOSE TO BELIEVE MR. RODRIGUEZ -- THERE IS AN INSTRUCTION IN HERE AND I WILL READ THIS TO YOU. THE TESTIMONY OF ONLY ONE WITNESS CAN PROVE ANY FACT. AND BEFORE YOU CONCLUDE THE TESTIMONY OF ONE WITNESS PROVES A FACT YOU SHOULD CAREFULLY REVIEW THAT EVIDENCE. THIS INSTRUCTION, THE OLD INSTRUCTION SAID THE TESTIMONY OF ONE WITNESS WHO YOU CHOOSE TO BELIEVE IS SUFFICIENT FOR THE PROOF OF THAT FACT. SO IT ISN'T THIS INSTRUCTION TELLING YOU THAT ONE WITNESS IS SUFFICIENT.

AND I READ THE INSTRUCTIONS TO YOU ABOUT CIRCUMSTANTIAL EVIDENCE. THAT ONLY APPLIES TO CIRCUMSTANTIAL EVIDENCE. IT DOESN'T APPLY TO DIRECT EVIDENCE. AND I GAVE YOU AN EXAMPLE OF DIRECT EVIDENCE WHERE

SOMEBODY SAYS I SAW IT RAINING OUTSIDE AND THE OTHER PERSON SAYS I SAW A GUY COME IN WITH A RAINCOAT THAT HAD RAINDROPS ON IT. SO YOU GOT TO DRAW AN INFERENCE. USE THAT CIRCUMSTANTIAL INSTRUCTION WHEN IT APPLIES TO CIRCUMSTANTIAL EVIDENCE AS OPPOSED TO DIRECT EVIDENCE.

JUST KIND OF GOING BACK OVER THE ELEMENTS OF THE PARTICULAR CRIME, NUMBER ONE, AND THIS IS INSTRUCTION ON PAGE 17 OF YOUR PACKET, DEFENDANT TOOK POSSESSION OF PROPERTY OWNED BY SOMEBODY ELSE, DEFENDANT TOOK THE PROPERTY WITHOUT THE OWNER'S CONSENT, AND THE DEFENDANT TOOK THE PROPERTY HE INTENDED TO DEPRIVE THE OWNER OF IT PERMANENTLY, THE DEFENDANT MOVED THE PROPERTY EVEN A SMALL DISTANCE, KEPT IT FOR ANY PERIOD OF TIME, HOWEVER BRIEF. THE THEFT, IN THIS CASE THE PROPERTY, COULD BE OF ANY VALUE NO MATTER HOW SLIGHT. OBVIOUSLY THE DEFENDANT'S CHARGE IN COUNT 1 INVOLVES ALL OF THAT THEFT ELEMENTS PLUS THE ADDITIONAL ELEMENT THAT HE HAS A PRIOR THEFT-RELATED CONVICTION.

SO THOSE ARE THE PIECES YOU'RE DEALING WITH IN TERMS OF THE CHARGES THEMSELVES, THE ADEQUACY OF THE EVIDENCE. OBVIOUSLY YOUR EVALUATION IS ONE THAT IS IMPORTANT, NOT MINE. BUT I THINK THOSE INSTRUCTIONS KIND OF HIGHLIGHTED TOGETHER WITH MY COMMENTS THAT YOU -- IT REALLY IS A CREDIBILITY CALL. IF YOU DON'T BELIEVE MR. RODRIGUEZ, IT'S NOT CONVINCING YOU, FINE, THAT IS MORE PROBABLE, NOT ENOUGH, THERE IS SOME CIRCUMSTANTIAL EVIDENCE THAT MIGHT BE CONSIDERED.

YOU JUST HAVE TO EVALUATE. ***MR. SPONSELLER OBVIOUSLY SAID HE DIDN'T DO IT, SO YOU GOT TO EVALUATE HIS PIECE OF EVIDENCE TOO. CHOOSE WHO YOU'RE GOING TO BELIEVE. IT CAN'T BE BOTH TRUE. YOU GOT TO MAKE A DECISION, AND IT REQUIRES THAT YOU BE CONVINCED BY THAT ABIDING CONVICTION.*** IT'S NOT GOING TO ELIMINATE ALL POSSIBLE OR IMAGINARY DOUBT, NOT GOING TO ANSWER ALL QUESTIONS THAT MIGHT ARISE DURING YOUR DELIBERATIONS.

NOW, I DO WANT TO TELL YOU EVEN THOUGH I MADE A COMMENT ABOUT BEING A CREDIBILITY CALL, PROBABLY NOT NEWS TO YOU FOLKS I DO HAVE TO ADVISE YOU ANY OF MY COMMENTS SHOULD BE TAKEN AS ADVISORY AND DO NOT INTERPRET THESE COMMENTS AS THE COURT TRYING TO MAKE YOU, FORCE YOU TO MAKE A DECISION OR EVEN TO COME TO A DECISION. ***IF YOU TURN OUT TO BE A HUNG JURY, SO BE IT.*** IF JURORS CANNOT REACH A UNANIMOUS DECISION, THEN THAT IS JUST THE WAY IT IS. AS LONG AS EVERYBODY'S DELIBERATING, CONSIDERING THE POINTS OF THE LAW, NOT GOING OUTSIDE OF THE EVIDENCE IN THIS CASE AND FOCUSING UPON WHAT HAPPENED BEFORE YOU IN EVIDENCE AND NOT OTHER THINGS.

SO GIVE IT ANOTHER SHOT. SEE WHERE YOU ARE. IF IT DOESN'T WORK, IT DOESN'T WORK. JUST LETTING YOU KNOW.

JUROR #11: VERY WELL.

(JURY DELIBERATING)

(JURY PRESENT)

THE COURT: ALL RIGHT. PEOPLE VERSUS SPONSELLER. THE RECORD REFLECT WE NOW HAVE REASSEMBLED WITH MR. SPONSELLER, "HIS ATTORNEY, THE DISTRICT ATTORNEY, AND ALL OF OUR JURORS.

BY THE COURT: Q JUROR #11, THE BAILIFF HAS INFORMED ME THE JURORS ARE ABLE TO REACH A VERDICT; IS THAT TRUE.

A YES, THAT IS TRUE.